

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VEBOL EDIBLES, INC.	:	
D/B/A HICKORY HOUSE	:	
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period March 1, 1981 through	:	
February 29, 1984.	:	

DETERMINATION

In the Matter of the Petitions	:
of	:
EDWARD BOLSKI,	:
OFFICER OF VEBOL EDIBLES, INC.	:
D/B/A HICKORY HOUSE	:
for Revision of Determinations or for Refunds of	:
Sales and Use Taxes under Articles 28 and 29 of	:
the Tax Law for the Period March 1, 1981 through	:
November 30, 1984.	:

Petitioner Vebol Edibles, Inc. d/b/a Hickory House, 109 East 59th Street, New York, New York 10022, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through February 29, 1984 (File No. 801639).

Petitioner Edward Bolski, officer of Vebol Edibles, Inc. d/b/a Hickory House, 108-17 86th Avenue, Richmond Hill, New York 11418, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through November 30, 1984 (File Nos. 801635 and 802544).

A consolidated hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1987 at 1:15 P.M., with the record held open for the submission of additional evidence until October 23, 1987. Petitioners appeared by Sylvor,

Schneer, Gold & Morelli (Richard L. Gold, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the audit method used to determine additional taxes due from Vebol Edibles, Inc. d/b/a Hickory House was proper and correct.

II. Whether reasonable cause existed for petitioners' failure to pay the proper sales tax due, thereby warranting cancellation of penalty charges and interest charges in excess of minimum interest.

FINDINGS OF FACT

1. On September 20, 1984, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Vebol Edibles, Inc. d/b/a Hickory House (hereinafter "Vebol"). Said notice, which encompassed the period March 1, 1981 through February 29, 1984, assessed sales taxes due of \$78,426.78, plus penalty of \$16,645.33 and interest of \$20,035.54, for a total amount due of \$115,107.65. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was also issued on September 20, 1984 to Edward Bolski as an officer of Vebol. The notice issued to Mr. Bolski assessed amounts identical to those assessed against Vebol.

2. On June 20, 1985, the Audit Division issued a second notice to Edward Bolski as an officer of Vebol for the quarters ended August 31, 1982, May 31, 1983, August 31, 1983, May 31, 1984, August 31, 1984 and November 30, 1984. The notice assessed additional sales taxes due of \$16,607.07, plus penalty of \$3,589.68 and interest of \$3,437.45, for a total amount due of \$23,634.20. The \$16,607.07 in tax assessed against Mr. Bolski individually represented tax due shown on returns filed by Vebol where the checks issued by Vebol in payment of the tax were returned because of insufficient funds.

3. At the hearing held on April 30, 1987, petitioner Edward Bolski conceded that he is personally liable for any taxes which may be due from Vebol for the periods in issue. Mr. Bolski also conceded the additional tax, penalty and interest due as assessed in the notice dated June 20,

1985, with the sole exception that he had not been given credit for all payments which were made. On October 23, 1987, Mr. Bolski agreed that he had received credit for all payments made and therefore the notice dated June 20, 1985 will not be addressed hereinafter.

4. During the period at issue herein, Vebol operated a coffee shop at 109 East 59th Street, New York, New York. The coffee shop had a counter area with 18 stools and there were also tables and chairs in the back of the shop which seated an additional 70 customers. The shop was open Monday through Friday 7:00 A.M. to 5:00 P.M. and on Saturdays from 11:00 A.M. to 2:30 P.M. The shop was closed on Saturdays during July and August.

5. Vebol did not maintain complete and adequate books and records during the period at issue. Vebol was unable to produce cash receipts ledgers, cash register tapes, guest checks or any other sales records for the period March 1, 1981 through December 31, 1981.

6. In order to verify the accuracy of reported sales, the Audit Division, in light of the insufficiency of Vebol's books and records, resorted to the use of a two-day observation test. Using Thursday, February 16, 1984 and Tuesday, February 21, 1984 as observation dates, the Audit Division computed average daily sales of \$2,005.00. This figure was projected throughout the entire audit period and produced a total sales figure of \$1,863,732.00. The following chart details the computation of the aforementioned total sales figure:

Average daily sales	\$ 2,005.00
Days per week	<u>x 5</u>
Subtotal	\$ 10,025.00
Saturday sales - ½ of weekday sales	<u>+ 1,003.00</u>
Sales per week	\$ 11,028.00
Weeks per quarter	<u>x 13</u>
Sales per quarter	\$ 143,364.00
Quarters per audit period ¹	<u>x 13</u>
Audited sales	<u>\$1,863,732.00</u>

7. The audited sales figure of \$1,863,732.00 was reduced by the following amounts to arrive at audited taxable sales of \$1,680,399.00:

¹In its calculations, the Audit Division erroneously computed audited sales for 13 quarters. The audit period involved herein consists of only 12 quarters.

(i) by \$33,009.00 for 33 holidays (11 per year) where Vebol was closed for business.

The Audit Division considered each holiday as a Saturday, thereby producing a reduction of \$1,003.00 per holiday instead of a \$2,005.00 reduction had the holidays been considered weekdays.

(ii) by \$115,940.09 to take into consideration inflation rates of 10 percent, 5 percent and 4 percent, respectively, per year.

(iii) by \$34,294.00 to allow for nontaxable take-out sales of baked goods and fresh fruit.

8. The audited taxable sales figure of \$1,680,399.00 was reduced by reported taxable sales to arrive at additional taxable sales of \$922,065.00. The additional taxable sales figure of \$922,065.00 was divided by the 12 quarters in the audit period to produce additional taxable sales per quarter of \$76,838.75. Tax due on additional taxable sales amounted to \$75,686.20.

9. Also included in the notice issued to Vebol were \$1,385.97 of tax due from overcollections and \$1,184.02 of tax due on cigarette sales. The tax due on overcollections was the result of a review of a portion of the guest checks for February 16, 1984 which revealed the overcollection of tax in the amount of \$.51. The amount of tax overcollected was divided by the total tax due on the invoices reviewed (\$22.59), which produced an error rate of 2.26 percent. Said error rate was applied to tax reported due on Vebol's returns and resulted in a tax due of \$1,385.97.

10. During the course of the two day observation test, the auditor noted that cigarette sales were not included in sales rung up through the cash register nor were they included on guest checks. The tax due on cigarette sales was computed by applying an audited markup of 62.02 percent to audited cigarette purchases of \$8,962.99. This procedure resulted in audited cigarette sales of \$14,424.63 and a tax due thereon of \$1,184.02.

11. As previously noted in Finding of Fact "4", supra, Vebol was open for business on Saturdays only from 11:00 A.M. to 2:30 P.M. Sales on Saturdays totalled 25 percent of weekday sales. Also, Vebol was closed on all Saturdays during the months of July and August.

12. Vebol's nontaxable take-out sales of baked goods and fresh fruit averaged \$250.00 per

weekday and \$62.50 for Saturdays. Nontaxable take-out sales totalled \$17,062.50 for the quarters ended February 28, May 31, and November 30 and \$16,500.00 for the quarters ended August 31.

SUMMARY OF PETITIONERS' POSITION

13. Petitioners argue that the days on which sales were observed, i.e., February 16, 1984 and February 21, 1984, were unusually high volume days because of various sales being offered by surrounding department stores. For this reason, petitioners believe that the sales made on the two observation dates were not representative of normal daily sales and should not be used as a basis to compute sales for the entire audit period.

14. Petitioners also argue that cigarette sales were included in the \$2,005.00 daily sales figure as computed by the Audit Division and should therefore not be separately computed.

15. Petitioners' final argument alleges a reduction in sales due to major construction in the area of the coffee shop. It is petitioners' contention that major construction, which began in late 1980 and was finished in late 1983, severely reduced pedestrian traffic in and around the coffee shop and that therefore sales were lower during this period.

CONCLUSIONS OF LAW

A. That Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner did not have documents which would serve as a verifiable record of taxable sales. Under the circumstances, the Audit Division's use of an observation test was proper in accordance with Tax Law § 1138(a) (Matter of Licata v. Chu, 64 NY2d 873; Matter of Sakran v. State Tax Commission, 73 AD2d 989).

B. That pursuant to footnote 1, supra, the Audit Division erroneously computed audited sales as if there were 13 quarters in the audit period. Since there were only 12 quarters in the audit period, the computation of audited sales is to be modified accordingly.

C. That petitioners have established that Saturday sales were equal to 25 percent of

weekday sales and not 50 percent as estimated by the Audit Division. Petitioners have also established that the coffee shop was closed on Saturdays during July and August.

D. That there is no basis in the record to support that the 33 holidays should be considered as Saturdays and not weekdays. It is more reasonable to find that during the audit period there existed at least 33 holidays which fell on weekdays. Accordingly, the reduction of audited sales to account for holidays is to be increased from \$33,099.00 to \$66,165.00 (33 x \$2,005.00).

E. That petitioners have also established that nontaxable take-out sales of baked goods and fresh fruit totalled \$17,062.50 for all quarters ended February 28, May 31 and November 30 and \$16,500.00 for all quarters ended August 31.

F. That, with the modifications enumerated in Conclusions of Law "B", "C", "D" and "E", supra, the Audit Division has reasonably calculated Vebol's taxable sales. Petitioners have failed to demonstrate that the audit method used, as modified herein, was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

G. That petitioners have failed to adduce any credible evidence to warrant cancellation of penalty charges or reduction of statutory interest charges to minimum interest.

H. That the petitions of Vebol Edibles, Inc. d/b/a Hickory House, and Edward Bolski, as officer, are granted to the extent indicated in Conclusions of Law "B", "C", "D" and "E", supra; that the Audit Division is directed to recompute the notices of determination and demands for payment of sales and use taxes due dated September 20, 1984 consistent with the determination rendered herein; and that, except as so granted, the petitions are in all other respects denied.

I. That the petition of Edward Bolski for revision of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 20, 1985 is in all respects denied.

DATED: Albany, New York
January 7, 1988

ADMINISTRATIVE LAW JUDGE